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No. 08-374

In the

Supreme Court of the United States

In re Merix Corporation Securities Litigation

MERIX CORPORATION, ET AL.,

Petitioners,

v.

CENTRAL LABORERS PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Petition for Writ of Certiorari (the "Petition") addresses two primary issues.

First, the Petition argues that there is a direct conflict between the circuits concerning the application of the sounds-in-fraud doctrine to non-fraud claims and that the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") incorrectly held that Respondent's Second Consolidated and Amended Class Action Complaint ("SAC") did not sound in fraud, so as to trigger the heightened pleading standard of Fed. R. Civ. P. 9(b). As detailed herein, there is no conflict between the circuits' application of the "sounds in fraud" doctrine. Consistent with its own precedent, as well as that of its sister circuits and this Court, the Ninth Circuit correctly held that Respondent's ***negligence-based*** claims brought pursuant to Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77k, 77l(a)(2), and 77o, respectively, are not subject to the provisions of Rule 9(b) because: (1) the allegations supporting those claims neither specifically allege fraud, nor facts that necessarily constitute fraud; and (2) accordingly, the claims do not "sound in fraud." Pet. Appx. at 2a.[1]

Second, the Petition incorrectly contends there is a significant split between two circuits concerning how to treat factual allegations in a superseding complaint that conflict with factual allegations from a prior complaint. Even if a split were to exist, the cases Petitioners claim are in conflict

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[1] "Pet." refers to the Petition filed with this Court on September 22, 2008. "Pet. Appx." refers to Appendix A to the Petition.

are irrelevant here because the factual allegations of the first Consolidated and Amended Class Action Complaint ("CAC") and the SAC do not conflict. Rather, the number of claims simply decreased from the CAC to the SAC. The superseded CAC contained (1) strict liability claims under the Securities Act, based upon a theory of negligence, and (2) fraud-based claims under the Securities and Exchange Act of 1934 (the "Exchange Act"). The operative SAC, in contrast, contains only the strict liability, negligence-based Securities Act claims.[2]

Accordingly, review is not warranted.

STATUTORY PROVISIONS INVOLVED

The following Securities Act provisions and Federal Rules of Civil Procedure are involved in this matter:

Section 11 provides a cause of action to any person who acquires a security pursuant to a registration statement that, at the time it became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, against all persons who, *inter alia*, signed the registration statement, was a director of the issuer at the time the defective registration statement was filed, or was an underwriter with respect to such security. 15 U.S.C § 77k.

Section 12(a)(2) imposes liability upon any person who

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[2] Petitioners' arguments also fail because they ignore that: (1) the plaintiff is the master of the complaint; (2) the plaintiff may allege, and subsequently abandon, potentially competing theories of relief pursuant to Fed. R. Civ. P. 8, such as fraud and negligence; and (3) negligence is a lesser included mental state of fraud, such that the voluntary dismissal of the fraud claims from the CAC does not render contradictory the negligence claims remaining in the SAC.

offers or sells a security, by means of a prospectus, which contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, to any person purchasing such security from him. 15 U.S.C. § 77l(a)(2).

Section 15 imposes joint and several liability upon any person who "controls any person liable under section 11 or 12." 15 U.S.C. § 77o.

Fed. R. Civ. P. 8(a) provides that a pleading must contain, *inter alia*, a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 8(d)(2) allows "[a] party [to] set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."

Fed. R. Civ. P. 8(d)(3) allows "[a] party [to] state as many separate claims or defenses as it has, regardless of consistency."

Fed. R. Civ. P. 9(b) provides that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

STATEMENT OF THE CASE

A. Factual Background

Merix Corporation ("Merix" or the "Company") manufactures multi-layer printed circuit boards ("PCBs") used to interconnect components of electronic products and

systems. ER28 [¶3].[3] On January 29, 2004, Merix issued 3.2 million shares of common stock at $25.21 per share in a secondary public offering ("SPO") raising more than $88 million from investors. ER28 [¶2]. The SPO was effectuated pursuant to a Registration Statement filed with the SEC on Form S-3 on or about January 7, 2004, and amended on January 13, 2004 and January 28, 2004, and a Prospectus filed with the SEC on Form 424(b)(4) on or about January 29, 2004 (collectively, the "Prospectus"). *Id.*

At the time it was issued, the Prospectus contained material misstatements and omissions. Specifically, the Prospectus omitted or misrepresented that at the time of the SPO: (1) Merix's PCB orders had materially declined; (2) manufacturing problems were adversely affecting PCB production; (3) a material amount of PCBs were being sold in a defective state; and (4) certain of Merix's financial results contained in the Prospectus were materially overstated as a result of recognizing revenue upon shipment of these defective goods. ER31 [¶¶8-10].

On May 13, 2004, Merix issued a press release announcing that PCB sales had decreased due to both a drop in sales; and a manufacturing process error. ER32 [¶12].

As a result of these announcements, Merix's share price declined more than 30 percent from $15.32 per share on May 13, 2004 to $10.68 per share the following day. *Id.*

On June 30, 2004, Merix revealed it was terminating further expansion of certain manufacturing facilities due to the decline in demand from its customers. This news resulted in an additional 14.4 percent drop in Merix's share

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[3] "ER" denotes Respondent's Excerpts of Record filed with the Ninth Circuit in connection with its appeal. "SER" denotes Petitioners' Supplemental Excerpts of Record filed with the Ninth Circuit.

price. ER32-33 [¶13].

B. Proceedings Before The District Court

On November 15, 2004, after being appointed as Lead Plaintiff in this Action, Central Laborers Pension Fund ("the Fund") filed the CAC. The CAC alleged negligence-based claims under Sections 11, 12(a)(2) and 15 of the Securities Act, as well as fraud-based claims under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), respectively, and Rule 10b-5, promulgated thereunder, 17 C.F.R. § 240.10b-5.

Petitioners filed a motion to dismiss the CAC on February 25, 2005, contending, *inter alia*, that the CAC sounded in fraud, such that Rule 9(b) applied to all claims asserted.

The District Court issued its ruling on the papers, dismissing the CAC without prejudice on September 15, 2005, for failure to satisfy the applicable pleading requirements.

On November 18, 2005, Respondent filed the SAC, repleading only its negligence-based Securities Act claims. ***These claims do not contain fraud as an element. And the SAC contains no allegations of fraud in support of these claims.***

Petitioners filed a motion to dismiss the SAC on January 26, 2006, asserting that the SAC sounded in fraud. On September 21, 2006, the District Court heard oral argument on Petitioners' motion to dismiss, and recognized that the SAC, on its face, was premised upon a theory of negligence. *See* ER136 [lines 5-8].

On September 28, 2006, the District Court issued an Order dismissing the SAC with prejudice. It stated in its Order that it (1) relied on "the reasons stated on the record"

during oral argument; (2) "strip[ped] §§ 11 and 12(a)(2) claims of all allegations of fraud"; and (3) evaluated the remaining allegations under Rule 8(a). Pet. Appx. at 5a. The District Court concluded that, after disregarding the allegations it believed alleged fraud, the remaining allegations did not state a claim under the Securities Act. *Id.* The District Court did not identify which allegations it found to be fraud-based or the ones it determined sounded in negligence. Nor did it explain why the negligence allegations did not state a claim.

C. Proceedings Before The Court of Appeals

On October 13, 2006, Respondent filed a Notice of Appeal to the Ninth Circuit with the District Court.

In its Opening Brief, Respondent argued that the SAC: (1) expressly alleges that Petitioners acted negligently, not fraudulently; (2) alleges that Petitioners are liable for failing to conduct a reasonable investigation into the truth or falsity of the statements in the Prospectus in accordance with Section 11; and (3) alleges that misstatements and omissions regarding Merix's customer base, declining unit shipments, product demand, and poor quality controls were the product of Petitioners' negligence. As such, Respondent contended that the District Court erred by applying Rule 9(b) to any allegation in the SAC.

Respondent also argued, in response to Petitioners' Joint Answering Brief, that the factual allegations of the CAC and the SAC do not conflict. Respondent explained that (1) its Securities Act claims and the factual allegations pled in support thereof in the CAC and SAC were virtually identical; (2) the CAC was of no further force and effect once it was superseded by the SAC; (3) Rule 8 allows a plaintiff to allege potentially inconsistent claims in the same pleading and, thus, the fraud claims in the CAC did not affect the

negligence claims in the CAC or the SAC; and (4) as negligence is a lesser included mental state of fraudulent intent, allegations claiming that an action was the result of negligence and/or fraud do not conflict.

On April 22, 2008, the Ninth Circuit reversed the District Court's Order, holding that the SAC: (1) neither "specifically alleges fraud, nor any facts that necessarily constitute fraud" and, thus, does not "sound in fraud"; and (2) "is not required to comply with the heightened pleading requirements" of Rule 9(b). Pet. Appx. at 2a.[4]

The court also rejected Petitioners' claim that the fraud allegations in the CAC caused the negligence allegations in the CAC and the SAC to forever sound in fraud and be subject to Rule 9(b). *Id.* Specifically, it held that "[t]he Fund is not foreclosed from making allegations or claims in the SAC that are inconsistent with or contradicted by allegations or claims made in the Fund's previous complaint." *Id.*

Petitioners sought panel and *en banc* rehearing of the decision. Judge Rymer, who concurred in the panel decision, was the sole judge to recommend rehearing. Accordingly, the Ninth Circuit denied Petitioners' requests.

The Petition followed.

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[4] On the same day that the Ninth Circuit heard argument in this matter, it also heard argument on the sounds-in-fraud issue in the matter of *Safron Capital Corp. v. Leadis Technology, Inc.*, 274 Fed. Appx. 540, 2008 WL 1776407 (9th Cir. Apr. 18, 2008) (unreported), *petition for cert. filed*, __ U.S. __ (U.S. Sept. 22, 2008) (No. 08-376). Three days before the Court handed down its 1-page opinion in this matter, it handed down a 4-page opinion in *Leadis* that further explains its position on the sounds-in-fraud doctrine. *See id.*

REASONS FOR DENYING THE PETITION

This Court should deny the Petition as there is no compelling reason to grant it.

At its core, the Petition amounts to nothing more than an impermissible request that this Court review – for correctness – the Ninth Circuit's application of well-settled rules of law to the facts of this case.

First, there is no split among the circuits, or with this Court, regarding whether Rule 8(a) applies to complaints alleging only negligence-based claims under §11 and §12(a)(2) of the Securities Act where, as here, such claims are not supported by any allegations of fraud. Fraud is not an element of Section 11. Liability under §11 is strict and "virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (footnote omitted). Nor is there any indication that the Ninth Circuit did not engage in the proper analysis, or that its conclusions were incorrect.

Indeed, this Court has twice concluded that any perceived conflict among the circuits on the sounds-in-fraud issue does not raise a compelling conflict warranting review. *See Anderson v. Clow* (*In re Stac Elecs. Sec. Litig.*), 520 U.S. 1103 (1997) (denying petition for writ of certiorari); *NationsMart Corp. v. Carlon*, 524 U.S. 927 (1998) (same). *Stac* and *NationsMart* were better suited for review than the instant matter because the complaints there presented fact patterns that mixed Securities Act claims with fraud-based Exchange Act claims that the defendants contended caused the Securities Act claims to sound in fraud. Here, the SAC contains only Securities Act claims, and alleges only negligence in support of such claims.

Second, Petitioners' other suggested basis for review – that there is a split in authority regarding whether a plaintiff may plead allegations in an amended pleading that

purportedly conflict with allegations in a prior iteration – is based on an inaccurate presentation of the law and is misplaced as the Securities Act allegations in the CAC are virtually identical to those in the SAC.

I. THERE IS NO REASON TO REVIEW THE NINTH CIRCUIT'S APPLICATION OF THE WELL-ESTABLISHED SOUNDS-IN-FRAUD DOCTRINE

The Ninth Circuit, following its own precedent, applied well-established legal standards in determining whether the sounds-in-fraud doctrine applied to the SAC. *See* Pet. Appx. at 2a. The Ninth Circuit found: (1) fraud is not an essential element of the claims raised in the SAC; (2) the SAC does not specifically allege fraud and the facts on which those allegations are predicated do not necessarily constitute fraud; and (3) thus, the allegations in the SAC do not "sound in fraud," so as to trigger Rule 9(b). *Id.*

Petitioners now attempt to raise purported conflicts of law between the Ninth Circuit's decision and (1) earlier Ninth Circuit precedent; (2) decisions of other courts of appeals; and (3) decisions of this Court, to create reviewable questions. These attempts fail.

A. There is No Intra-circuit Conflict

Petitioners incorrectly contend the instant case is appropriate for review because of a purported intra-circuit conflict between *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) and *Anderson v. Clow* (*In re Stac Elecs. Sec. Litig.*), 89 F.3d 1399, 1103-04 (9th Cir. 1996), *cert. denied*, 520 U.S. 1103 (1997).

Even assuming *Vess* and *Stac* conflict, this Court long has held that intra-circuit conflicts do not warrant review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

Furthermore, *Vess* and *Stac* do not conflict. These cases each involved substantially different issues of fact and law and, despite Petitioners' suggestion to the contrary, *Vess* followed and properly applied *Stac*.

In *Stac*, the Ninth Circuit considered whether Rule 9(b) applied to §11 claims that were pled alongside fraud-based claims under §10(b) of the Exchange Act, and were based entirely on the same underlying fraudulent conduct. *See id.*, 89 F.3d at 1402-03 (alleging that Stac went public knowing, but without disclosing "pertinent information in its possession regarding Microsoft's plans to include data compression in its newest version of DOS" and reporting false financial statements, "violat[ing] Section 11 of the Securities Act [and] Section 10(b) of the Exchange Act...."). [5] Here, Respondent alleges neither fraud-based Exchange Act claims, nor knowledge or concealment on the part of Petitioners. Thus, the Ninth Circuit's ruling below cannot be said to implicate or conflict with *Stac*.

The legal issue raised in *Vess* is more applicable to this matter and does not conflict with the Ninth Circuit's earlier ruling in *Stac*. *Vess*, unlike *Stac*, raised the issue of whether Rule 9(b) applied to non-fraud based claims that were supported by some fraudulent ***and*** some non-fraudulent allegations. *See id.*, 317 F.3d at 1104 ("***This circuit has not analyzed*** the application of Rule 9(b) in a case where fraud is not an essential element of the claim, and where allegations of both fraudulent and non-fraudulent conduct are made in the complaint.") (Emphasis added). The Ninth Circuit's own recognition that it was addressing an issue of first impression

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[5] *Stac* does not articulate when an allegation is deemed to aver fraud, as opposed to negligence. Rather it merely holds that once the court determines that a claim is "grounded in fraud," then the claim is subject to Rule 9(b). *Id.*, 89 F.3d at 1404-05. As shown below, *Vess* follows this principle.

in *Vess* establishes the lack of any conflict with *Stac*.

Vess, in fact, also expanded upon the rule in *Stac* by holding that certain allegations of a complaint can be found to sound in fraud so as to trigger Rule 9(b), even if the complaint is not entirely based on a unified course of fraudulent conduct as was the case in *Stac*. *See Vess*, 317 F.3d at 1103-04 (citing *Stac*, 89 F.3d at 1404-05). The court held that allegations that allege fraud or facts that "necessarily constitute fraud" should be stripped from the complaint and the remaining non-fraud allegations should be analyzed under Rule 8(a). *Id.* at 1105.[6]

Vess's articulation of when select allegations are subject to Rule 9(b) is an expansion of *Stac's* rule governing when entire claims are subject to Rule 9(b). Accordingly, the cases do not conflict and Petitioners have failed to raise a compelling issue warranting review.[7]

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[6] Petitioners contend that the "necessarily constitute fraud" language from *Vess* as it was used by the Ninth Circuit in this matter changed the standard put in place by *Stac*. *See* Pet. at 26. As noted above, however, *Vess* expanded upon the rule in *Stac*; it did not alter it. Additionally, the foregoing language from *Vess* cannot be said to have loosened the standard imposed by *Stac* as *Vess* made clear that non-fraud based claims could be subject to Rule 9(b) if pled to include factual allegations that implicate the elements of fraud; even if the term "fraud" is not used. *See Id.*, 317 F.3d at 1105.

[7] It bears noting that the Ninth Circuit's opinion in *Leadis*, which also addressed the sounds-in-fraud issue and was handed down three days before the *Merix* opinion, cited to both *Vess* and *Stac*, undercutting Petitioners' claim that the Ninth Circuit missed purportedly divergent, controlling case law. *See Leadis*, 274 Fed. Appx. at 541, 2008 WL 1776407, at *1. The *Leadis* opinion also cites to *Sparling v. Daou* (*In re Daou Sys.*), 411 F.3d 1006, 1027-28 (9th Cir. 2005), *cert.*

B. There is No Inter-Circuit Conflict

1. Rule 8(a) Applies to Allegations of Negligence, While Rule 9(b) Applies to Allegations of Fraud

Petitioners also contend that the Ninth Circuit's decision below amounts to a categorical refusal ever to apply Rule 9(b) to Securities Act claims and, thus, conflicts with the holdings of other circuits. Pet. at 25; Pet. Appx. at 2a. Petitioners' contention fails, as all of the circuits that have addressed the issue, including the Ninth, recognize that Rule 9(b) may apply to Securities Act claims that are supported by allegations of fraudulent or deceptive conduct.

As a threshold matter, the federal appellate decisions cited by Petitioners are inapplicable to the instant matter as they (1) considered whether Rule 9(b) applied to Securities Act claims pled alongside fraud-based Exchange Act claims; and/or (2) involved Securities Act claims that were supported by actual allegations of fraud, or were predicated upon the same conduct underlying the fraud-based Exchange Act claims. *See* Pet. at 25 (citing cases). Here, the SAC does not contain any Exchange Act claims and the Ninth Circuit's holding recognized that the facts pled in the SAC sound in something other than fraud. Accordingly, the Ninth Circuit correctly held that Rule 9(b) is not implicated.

Additionally, Petitioners fail to articulate an actual or meaningful conflict in need of resolution as the circuits uniformly impose Rule 9(b) scrutiny on allegations of fraud, and Rule 8(a) upon those rooted in negligence.

First, while Petitioners claim that the Ninth Circuit

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denied, 546 U.S. 1172 (2006), which cites *Vess* and *Stac* as controlling authorities. *See id.*

improperly applied Rule 8(a) to the negligence claims in the SAC, Petitioners disregard that the circuits uniformly hold that Rule 8(a) applies to claims for which fraud is not an element, where those claims are not predicated on fraud – such as those alleged in the SAC. *See, e.g., In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 272 (3d Cir. 2006) ("where the claims are expressly premised on negligence rather than fraud, Rule 9(b) has been held inapplicable") (citation omitted); *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) ("In deciding this issue [whether Rule 9(b) applies to Securities Act claims], several circuits have distinguished between allegations of fraud and allegations of negligence, applying Rule 9(b) only to claims pleaded under Section 11 and Section 12(a)(2) that sound in fraud.") (citations omitted); *Carlon v. Thaman* (*In re NationsMart Corp. Sec. Litig.*), 130 F.3d 309, 315 (8th Cir. 1997), *cert. denied*, 524 U.S. 927 (1998) ("plain tiffs made clear that they did not allege in the context of their § 11 claim that the defendants were liable for fraudulent or intentional conduct. Therefore, their claim should not have been dismissed for failing to comply with Rule 9(b)") (internal citation omitted); *accord Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997); *Lone Star Ladies Inv. Club v. Schlotsky's, Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) (citation omitted); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1278 (11th Cir. 2006). Thus, no conflict exists.

Second, the circuits uniformly hold or, in the case of the Eighth Circuit, leave open the possibility that Rule 9(b) may apply to Securities Act claims when such claims are "predicated," "premised" or "grounded" in fraud or "sound in fraud." *See, e.g., Vess*, 317 F.3d at 1103-04 (citing *Stac*, 89 F.3d at 1404-05); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996) ("despite the minimal requirements of Sections 11 and 12(2), a complaint asserting violations of those statutes may yet 'sound[] in fraud,'" such that Rule 9(b) would apply) (citation omitted); *Shapiro v.*

UJB Fin. Corp., 964 F.2d 272, 288 (3d Cir. 1992) ("we hold that when § 11 and § 12(2) claims are grounded in fraud rather than negligence, Rule 9(b) applies."); *Lone Star Ladies*, 238 F.3d at 368 (same); *Rombach*, 355 F.3d at 167 (same); *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) (holding that Rule 9(b) applies to "[a] claim that 'sounds in fraud' -- in other words, one that is premised upon a course of fraudulent conduct") (citations omitted); *Wagner*, 464 F.3d at 1278 (holding that "§11 or §12(a)(2) claim[s] must be pled with particularity when the facts underlying the misrepresentation at stake in the claim are said to be part of a fraud claim, as alleged elsewhere in the complaint" and stating that its holding is "in line with the majority of circuits to address the matter" – which it identifies as the Second, Third, Fifth, and Ninth Circuits) (citations omitted); *cf. NationsMart*, 130 F.3d at 315 (recognizing that the Fifth, Ninth, Third and Seventh Circuits "have sometimes applied Rule 9(b) to claims brought under §§ 11 and 12(2) ... when they are 'grounded in fraud'" but declining to apply that rule to the complaint at issue because the plaintiffs "made clear that they did not allege ... that the defendants were liable for fraudulent or intentional conduct") (citations omitted).[8] Thus, no conflict exists here.

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[8] While *NationsMart* declined to find that the complaint was "grounded in fraud," even though the plaintiff's "allegations of innocent or negligent misrepresentation, which are at the heart of a § 11 claim ... alleged more than was necessary to recover under § 11 of the Securities Act," the Court noted that "in a complaint averring fraud, the circumstances constituting fraud or mistake shall be stated with particularity." *Id.*, 130 F.3d at 314 (internal quotation marks omitted). Thus, Petitioners misrepresent the holding of *NationsMart* by suggesting that it categorically refuses ever to apply Rule 9(b) to Securities Act claims. *See* Pet. at 25, 33, 38-39. Indeed, it is unclear whether the Eighth Circuit

Third, the circuits that have addressed this issue also recognize that a Securities Act claim is "grounded in fraud," so as to trigger Rule 9(b) where the complaint alleges a unified course of fraudulent conduct in support of its claims. *See Shaw*, 82 F.3d at 1223 ("[I]f a plaintiff were to attempt to establish violations of Sections 11 and [12(a)(2)] as well as the anti-fraud provisions of the Exchange Act through allegations in a single complaint of a unified course of fraudulent conduct . . . Rule 9(b) would probably apply to the Section 11, [12(a)(2)], and Rule 10b-5 claims alike") (citation omitted); *Rombach*, 355 F.3d at 171 (holding that Securities Act claims are "predicated" or "premised on allegations of fraud" where the "same course of conduct that would support a Rule 10b-5 claim may as well support a Section 11 claim or a claim under Section 12(a)(2)"); *Borsellino*, 477 F.3d at 507 (same) (citations omitted); *Leadis*, 274 Fed. Appx. at 541, 2008 WL1776407, at *1 ("Where the allegations in a complaint do not use the word 'fraud' to describe a defendant's actions, a complaint 'sounds in fraud' or is 'grounded in fraud' and Rule 9(b) nonetheless applies whenever a complaint relies entirely on a 'unified course of fraudulent conduct.'") (citing *Vess*, 317 F.3d at 1105-06). Again, there is no conflict between the circuits.

Fourth, the circuits that have addressed the issue hold

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would unvaryingly refuse to apply Rule 9(b) to specific averments of fraud, or to entire claims for which fraud is not an element, if fraud was pled in support of such claims. This reading of *NationsMart* comports with the holdings of its sister circuits and demonstrates that there is no compelling conflict for this Court to resolve. Petitioners' reliance on *NationsMart* is further misplaced as *NationsMart* has a more lenient standard than the Ninth Circuit. Accordingly, any ruling by this Court to conform the Ninth Circuit to the Eighth Circuit standard would only hurt Petitioners.

that where fraud is not an essential element of a claim and that claim is not "grounded in fraud," but the complaint still contains some allegations of fraud, Rule 9(b) applies to the allegations of fraud, while Rule 8(a) applies to the remaining allegations of negligence. *See, e.g., Daou*, 411 F.3d at 1027 ("In a case where fraud is not an essential element of a claim, only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)") (citing *Vess*, 317 F.3d at 1105) (internal quotation marks omitted); *Lone Star Ladies*, 238 F.3d at 368 ("Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated."); *Kennedy v. Venrock Assoc.*, 348 F.3d 584, 593 (7th Cir. 2003) (same); *NationsMart*, 130 F.3d at 315 (same); *Baltimore County, Md. v. Cigna Health Care Mid-Atlantic, Inc.*, No. 06-1877, 238 Fed. Appx. 914, 2007 WL 1655461 (4th Cir. Jun. 5, 2007) (unreported) (same).

Ignoring the foregoing harmony between the circuits, Petitioners engage in intricate word-splicing to create a conflict where none exists. Specifically, Petitioners claim that the Ninth Circuit's holding -- that Rule 9(b) only applies to allegations that "necessarily constitute fraud" where no specific allegations of fraud exist -- is more liberal to plaintiffs than the standard providing for the application of Rule 9(b) to claims that are "premised" or "predicated" on fraud, or where the "gravamen of the complaint is fraud." Pet. at 27, 32-33. First, there is no compelling distinction between these terms that warrants review. Second, the wording that Petitioners seek to include in a model standard, *i.e.*, that Rule 9(b) would apply where the "gravamen" of the complaint is fraud, arose from the Ninth Circuit itself, in *Stac*. *See id.*, 89 F.3d at 1404, n.2 (holding that plaintiffs'

"nominal efforts [to disclaim fraud] are unconvincing where [as there] the ***gravamen*** of the complaint is plainly fraud....") (Emphasis added). As the Ninth Circuit panel that decided this matter cited *Stac* in its concurrent ruling in *Leadis* (as well as *Vess*, 317 F.3d at 1105-06, 1108, and *Daou*, 411 F.3d at 1027, which each upheld the holding in *Stac*), the panel's decision, as a practical matter, is aligned with the standard sought by Petitioners. *See Leadis*, 274 Fed. Appx. at 541, 2008 WL 1776407, at *1.

Petitioners' attempts to transform linguistic distinctions in the circuit courts' treatment of Rule 9(b)'s application to Securities Act claims into legal conflicts do not supply an adequate basis for granting the Petition.

C. Petitioners Improperly Seek Certiorari Review of Factual Determinations

Petitioners' inability to demonstrate a direct or compelling conflict between the circuits is underscored by the fact that their real objection here is to the Ninth Circuit's factual determination that the SAC did not contain any allegations of fraud and, accordingly, is not "grounded in fraud." *See* Pet. Appx. 2a (holding that the "SAC neither specifically alleges fraud, nor does it allege facts that necessarily constitute fraud") (citing *Vess*, 317 F.3d at 1104-05). This Court does not review, for correctness, the application of well-settled legal standards to the facts of a given case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Were this Court to review the facts of this case, however, it would find that the SAC is devoid of the allegations of knowledge, intent, deliberate recklessness, or reliance that are necessary to elevate a complaint for negligence into one for fraud *regardless of what legal*

standard is applied. See generally SAC; *see also Vess*, 317 F.3d at 1105 (clarifying that "[f]raud can be averred by specifically alleging fraud, **or** by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)" and explaining that facts that necessarily constitute fraud include allegations of "false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages") (Emphasis added).[9]

Indeed, the SAC alleges that the omissions and misrepresentations in the Prospectus were the product of negligence because Petitioners failed to conduct a reasonable investigation into the truth, falsity or completeness of the statements contained therein. The SAC does not allege that the misleading Prospectus was issued with *any* intent to deceive. *See* ER37-38, 67, 70, 73 [¶¶42, 123(c), 130-31, 145]. Every circuit that has addressed the issue has found such language to allege negligence and, thus, trigger Rule 8(a). *See Suprema*, 438 F.3d at 271 (holding allegation that, "had [defendants] exercised reasonable care, [they] could have known of the material misstatements and omissions

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[9] Although Petitioners also object to *Vess*' definition of fraud, *see* Pet. at 36, 33, 34-37, the Ninth Circuit's definition is aligned with that of its sister circuits. *See, e.g. Shapiro*, 964 F.2d at 287-88 ("The specific factual allegations upon which Count II is based ... repeatedly aver that defendants 'intentionally,' 'knowingly,' or 'recklessly' misrepresented and omitted to represent certain material information. ... The only reasonable conclusion that can be drawn is that plaintiffs charge defendants with fraud."); *Shaw*, 82 F.3d at 1223 ("Although the complaint does assert that defendants actually possessed the information that they failed to disclose, those allegations cannot be thought to constitute 'averments of fraud,' absent any claim of scienter and reliance.").

alleged herein," alleged negligence, not fraud); *Lone Star Ladies*, 238 F.3d at 369 (holding allegation "that Schlotzsky's made untrue statements of material facts and omitted to state material facts, in violation of 15 U.S.C. § 77k ... do not 'sound in fraud' and cannot be dismissed for failure to satisfy Rule 9(b)"); *Celestial Seasonings*, 124 F.3d at 1252 (holding allegations that: defendants "failed to make a *reasonable investigation* of the statements contained in the [offering documents]; the misrepresentations 'would have been known [by the defendants] had they carried out their responsibilities with *reasonable care*'"; and that defendants did not "possess[] *reasonable grounds for belief*, . . . and knew, or in the *exercise of reasonable care* should have known, that the statements . . . were materially untrue and incomplete,'" were not "premised on fraud") (Emphasis original) (internal citations omitted); *accord Rombach*, 355 F.3d at 178.[10]

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[10] Petitioners contend that *Rombach* conflicts with the foregoing cases as it held that the following language sounded in fraud vis-à-vis the management defendants: "that the Registration statement was 'inaccurate and misleading;' that it contained 'untrue statements of material facts;' and that 'materially false and misleading written statements' were issued." *See* Pet. at 27, 32 (citing *Rombach*, 355 F.3d at 172). Key to *Rombach*'s holding, however, was the court's finding that the plaintiffs (1) failed to identify any materially false statements in the Registration Statement and made no effort to allege the defendants' negligence in support of its Securities Act claims; and (2) relied entirely upon the same fraud-based conduct in support of its Securities Act claims against the management defendants, as it did in support of its Exchange Act claims against these defendants. *Id.*, 355 F.3d at 172, 175 (citing *Stac*, 89 F.3d at 1405 n.2). Importantly, the court recognized that the plaintiffs' Securities Act claims against the management defendants ***could*** have been pled in

Petitioners do not dispute that the SAC specifically alleges negligence, or that the SAC contains no allegations of knowledge, deception, deliberate recklessness or reliance. Instead, Petitioners contend that (1) "[i]f the facts alleged by plaintiff were true, it is highly unlikely that defendants would not have known of these and other facts that supposedly contradicted the Prospectus" and, (2) because Petitioners must have known of these material facts, they must have known that the Prospectus was misleading, and (3) as such, they must have issued the Prospectus with fraudulent intent, causing the SAC to sound in fraud. *See* Pet. at 34-36 (citing ER33, 40, 42-44, 46, 49-55 [¶¶10(iv), 49-53, 56, 58, 60, 62(a), 67-69, 75(a), 76-77, 78(a), 79, 82-83(d), 85-88]).

Petitioners' fraught analysis fails for several reasons. First, Petitioners' analysis would subject every §11 claim to Rule 9(b) scrutiny. Indeed, under Petitioners' analysis, corporate executives would be deemed to know about everything material to the company and, thus, every materially misleading statement in a Registration Statement. Second, Petitioners' argument is nonsensical as they suggest on the one hand that the misstatements were so obvious that they must have known of them and intentionally lied to the market, yet on the other they argue that such allegations would be insufficient to satisfy the pleading requirements of Rule 9(b). Third, Petitioners' argument has no bearing on the underwriter or director defendants, as those defendants did not engage in the day-to-day business of the Company and, thus, were not in the same position to know of the materially

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negligence, separate and apart from the Exchange Act claims based on the same misstatements. *See id.* at 176. Thus, under *Rombach*, Rule 9(b) would not apply to the SAC's negligence-based claims and, accordingly, *Rombach* is not at odds with the Ninth Circuit's ruling.

adverse facts misrepresented or omitted in the Prospectus. [11]

Petitioners' discontentment with the Ninth Circuit's application of the law to the facts of this case does not warrant review. *See Johnston*, 268 U.S. at 227.

D. The Ninth Circuit's Application of the Sounds-in-Fraud Doctrine Does Not Raise a Compelling Question of Federal Law

Not only have Petitioners failed to demonstrate a meaningful conflict of law between the circuits, they have failed to show that the decision for which they seek review concerns a compelling issue warranting review.

1. This Court Has Rejected Petitions To Review The Sounds-in-Fraud Doctrine In More Appropriate Cases

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[11] Petitioners also incorrectly argue that the instant case is appropriate for review because the Ninth Circuit has created a rule effectively precluding a stand-alone Securities Act claim from ever being subject to Rule 9(b). *See* Pet. at 26, 34-40. To the contrary, *Vess* (which the Ninth Circuit followed here) expressly noted that where fraud is not an element of a claim (such as in Securities Act claims) "a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct" and, thus, subject his claims to Rule 9(b). *Id.*, 317 F.3d at 1103-104; *see also In re Anchor Gaming Sec. Litig.*, 33 F. Supp. 2d 889, 893 (D. Nev. 1999) ("Plaintiffs' Complaint could have been drafted to simply allege, without embellishment, that the Prospectus contained materially false or misleading statements or omissions. However, Plaintiffs chose to do more. By including allegations of fraudulent misconduct, Plaintiffs brought the burden of Rule 9(b) upon themselves.").

On at least two other occasions, this Court rejected similar petitions by litigants who claimed that a circuit court's application of the sounds-in-fraud doctrine (1) conflicted with the approaches taken by its sister circuits; and (2) raised an important question of federal law. *See Anderson v. Clow*, 520 U.S. 1103 (1997) (denying petition concerning "whether Rule 9(b)'s requirement that circumstances constituting fraud must be averred with particularity can be applied to dismiss *nonfraud* claims arising under Securities Act §11"); *NationsMart Corp. v. Carlon*, 524 U.S. 927 (1998) (denying petition concerning whether the proper reach of Rule 9(b) encompasses "averments of fraud where scienter is not a required element of a plaintiff's cause of action" and whether fraud includes "averments that representations were made without reasonable basis").

As noted above, in *Stac* and *NationsMart*, the complaints contained fraud-based Exchange Act claims that the defendants contended caused the Securities Act claims to sound in fraud. Here, the SAC contains only Securities Act claims. Accordingly, because this Court denied the petitions for writ of certiorari in *Stac* and *NationsMart* – cases that potentially presented greater legal conflict – it should do so here, as well. [12]

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[12] Again, virtually all of the cases that have employed the sounds-in-fraud doctrine involved complaints that contained both Exchange Act and Securities Act claims. *See* Pet. at 25-26 (collecting cases). Additionally, contrary to Petitioners' suggestion, the few pure Securities Act complaints that have been found to sound-in-fraud for purposes of triggering Rule 9(b) were laced with allegations of fraud, which, as the Ninth Circuit found, are not present here. *See* Pet. at 12 (citing *Anchor Gaming*, 33 F. Supp. 2d at 892-93; *Rhodes v. Omega Research, Inc.*, 38 F. Supp. 2d 1353, 1461 (S.D. Fla. 1999);

E. The Decision Of The Ninth Circuit Is Not At Odds With *Twombly* or *Tellabs*

Petitioners next argue that the Ninth Circuit applied a standard for determining whether Rule 9(b) applies to a negligence-based complaint that is "inconsistent with the threshold pleading standard" adopted by this Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955 (2007). Pet. at 28-29. Petitioners' argument fails as *Twombly* discusses the standard of scrutiny to be applied ***once it is determined that Rule 8(a) is the appropriate pleading standard*** and, thus, is not applicable to the instant matter. *See id.*, 127 S. Ct. at 1964.

Twombly provides no guidance as to whether Rule 9(b) or Rule 8(a) should apply to a complaint, or whether Rule 9(b) may apply to negligence-based claims that contain no allegations of fraud – the central issue in this matter. *See id.* In fact, in *Twombly*, there was no debate that Rule 8(a) was the standard applicable to the complaint at issue. This Court held that in order to satisfy Rule 8(a), a plaintiff must allege "plausible grounds to infer" that the plaintiff was entitled to relief. *See id.* at 1965. For *Twombly* to be applicable to the instant matter, Rule 8(a) would first have to apply to the SAC – a reality that Petitioners refuse to accept. In effect, Petitioners attempt to employ this Court's guidance on how to assess a complaint under Rule 8(a) while contesting Rule 8(a)'s applicability to the SAC. This argument is at odds with itself, and does not trigger review.

Likewise, this Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007), is

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Schoenhaut v. Am. Sensors, Inc., 986 F. Supp. 785, 795 (S.D.N.Y. 1997); and *Competitive Assoc., Inc. v. Fire Fly Enter., Inc.*, 59 F.R.D. 336, 338 (S.D.N.Y. 1972)).

equally inapplicable. *See* Pet. at 12, 29, 31-33, 38, n.16. *Tellabs* addresses the issue of what inferences a court should consider in determining whether a plaintiff has adequately pled a strong inference of scienter in a securities fraud complaint under the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Exchange Act. *See id.*, 127 S. Ct. at 2506 (citation omitted). Like *Twombly*, *Tellabs* did not address how a court should determine which pleading standard, *i.e.*, Rule 8(a) or Rule 9(b), applies to negligence-based claims, and thus is of no moment here.

II. THERE IS NEITHER A REVIEWABLE CONFLICT BETWEEN *PAE* AND *BRADLEY* NOR A FACTUAL CONFLICT BETWEEN THE CAC AND THE SAC

Petitioners claim that there is a direct split between two circuits concerning how to treat allegations of an operative complaint that purportedly conflict with allegations of a former, superseded complaint. Pet. at 13. Petitioners' claim fails as (1) the purported split between the Ninth Circuit and the Federal Circuit is immaterial and does not warrant certiorari review, and (2) this rule of law has no applicability to this matter as the allegations of the CAC and SAC do not conflict.

A. There Is No Direct Conflict Between *PAE* And *Bradley* Or Any Other Federal Appellate Court

The Ninth Circuit's opinion provides one sentence on this issue, stating "[t]he Fund is not foreclosed from making allegations or claims in the SAC that are inconsistent with or contradicted by allegations or claims made in the Fund's previous complaint." Pet. Appx. at 2a (citing *PAE Gov't Servs. v. MPRI, Inc.*, 514 F.3d 856, 858-60 (9th Cir. 2007).

Petitioners contend that the foregoing sentence can be

read as holding that "district courts [in the Ninth Circuit] ***must*** give effect to allegations in an amended complaint that conflict with or contradict allegations in a prior version of that pleading." Pet. at 13 (emphasis added). In contrast, they contend that the Federal Circuit in *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1324-26 (Fed. Cir. 1998), held that courts ***may*** strike conflicting allegations as "fraud or sham." *See* Pet. at 13-16.[13]

First, Petitioners misread the Ninth Circuit's opinion in this matter and *PAE* as holding that district courts may ***not*** disregard conflicting allegations. Rather, *PAE* holds that a district court may, in its discretion, strike inconsistent or contradictory allegations made in a subsequent pleading that are factually inconsistent with or contradictory to allegations made in an earlier pleading *if* those allegations were made in bad faith. *Id.*, 514 F.3d at 858-60. Likewise, *Bradley* holds that a district "court [i]s not required to accept as true the inconsistent allegations in the second amended complaint," if

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[13] As an aside, it bears noting that Petitioners' first Question Presented erroneously assumes that the Ninth Circuit (or the District Court) concluded that the facts of the CAC and the SAC conflict. Pet. at i. Neither court, however, reached such a conclusion. In the absence of that conclusion, Petitioners' argument is necessarily that this Court should review a purported conflict between *PAE* and *Bradley* (regarding how a court should handle conflicts of fact between different iterations of a complaint) in a case where no conflict of fact was found. In order to have the legal question of whether *PAE* and *Bradley* conflict properly before it, this Court would first have to determine, as a matter of fact, whether the CAC and SAC conflict. As stated above, however, this Court does not review facts and rarely determines whether a particular standard was applied correctly to a given set of facts. *Johnston*, 268 U.S. at 227; *see also Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974).

it views "the changed and inconsistent factual allegations as false and sham." *Id.*, 136 F.3d at 1325-26.

The only difference between these cases is the courts' articulation of the proper means by which a district court may strike the offending allegations. *Bradley* holds that a court's discretion to strike an allegation is inherent, while *PAE* holds that a district court is confined to the authority granted under Fed. R. Civ. P. 11 or 12(f). *See Bradley*, 136 F.3d at 1325-26; *PAE*, 514 F.3d at 858-60. A disagreement regarding whence a district court's authority to engage in a given act originates is not a conflict warranting this Court's review. *Bunting v. Mellen*, 541 U.S. 1019 (2004) (recognizing importance of direct conflict as predicate to review).[14]

Petitioners also fail to identify a direct and compelling conflict between *PAE* and any other federal appellate court. For starters, *PAE* itself dispels of Petitioners' claim that its holding conflicts with the Ninth Circuit's decision in *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991). *See* Pet. at 14-15; *see also PAE*, 514 F.3d at 859 n.4 (holding that there is no "analogy between th[e] situation [in *Reddy*] and the one presented here"). Specifically, *PAE* "consider[ed] whether a district court may strike allegations from an amended complaint

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[14] Thus, the "contrary conclusion" recognized by the *PAE* court with respect to *Bradley*, and upon which Petitioners apparently attempt to seize, *see* Pet. at 13-16, does not establish a conflict worthy of this Court's review. *See PAE*, 514 F.3d at 859 (holding that "the district court's powers [to strike a pleading] are generally limited to those provided by the Federal Rules of Civil Procedure. Though the Federal Circuit reached a contrary conclusion in *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998), no other court of appeals has followed that decision and we decline to do so."); *Bradley*, 136 F.3d at 1325-26.

because they contradict an earlier iteration of the same pleading," whereas *Reddy* "stands for the unremarkable proposition that, where a complaint cannot be cured by amendment, the district court may deny leave to amend under Rule 15." *PAE*, 514 F.3d at 857.[15]

The approaches "suggested" by the D.C. Circuit in *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006), and the Seventh Circuit in *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972), are no different. *See* Pet. at 16-17. Like *Reddy*, *Belizan* and *Asher* stand for the proposition that a district court may dismiss a complaint with prejudice and without leave to amend if the requirements of Rule 15(a) are not met – including where amendment would be futile. *See Belizan*, 434 F.3d at 584 (holding that dismissal with prejudice is proper where "the allegation of other facts consistent with the challenged pleading could not possibly meet the heightened pleading requirements of the PSLRA"); *Asher*, 461 F.2d at 895 (holding that "[t]he test is whether or not the allegations of other facts consistent with the challenged pleading could cure the deficiency in the complaint").[16]

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[15] Because *PAE* and *Reddy* concern distinct issues, *PAE* also does not disturb any rule of law expounded by the *Reddy* court. As such, *PAE* does not, as Petitioners claim, "violate[] the principle that, absent relevant intervening Supreme Court precedent, one appellate panel may not overrule decisions of another panel." Pet. at 15, n.5 (citing *Truth v. Kent School District*, 542 F.3d 634, 644, 2008 WL 4138232, at *8-9 (9th Cir. 2008)). Moreover, any such conflict between *PAE* and *Reddy*, if it did exist, would concern nothing more than an intra-circuit dispute that does not warrant review. *See Davis*, 417 U.S. at 340.

[16] Petitioners' contention that *Bradley*'s approach "has been suggested by" the United States District Court for the Eastern

Petitioners also neglect to mention that the Ninth Circuit did not make any findings that the CAC and SAC actually conflicted. *See* Pet. Appx. at 2a (holding only that "***[t]he Fund is not foreclosed*** from making allegations or claims in the SAC that are inconsistent with or contradicted by allegations or claims made in the Fund's previous complaint.") (Emphasis added). Thus, and in any case, nothing about the Ninth Circuit's ruling facially contravenes *Bradley* or warrants certiorari review.

B. Any Conflict Between *PAE* And *Bradley*, Even If It Exists, Has No Bearing On The Instant Matter As The CAC And SAC Do Not Conflict

PAE and *Bradley* concern the issue of a court's ability to consider factual allegations pled in a subsequent pleading that are inconsistent with facts pled in an earlier pleading. They are, thus, inapposite to this matter, as the SAC contains no factual allegations that are inconsistent with the facts pled

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District of New York in *Wallace v. New York City Dep't of Corr.*, No. 95 CV 4404, 1996 WL 586797, at *2 (E.D.N.Y. Oct. 9, 1996) (unreported), and the Delaware Superior Court in *Krauss v. State Farm Mut. Auto. Ins. Co.*, No. 03C-08-252 RRC, 2004 WL 2830889 (Del. Super. Ct. Apr. 23, 2004) (unreported), has no bearing on the Petition. Pet. at 16, 19. The Eastern District of New York does not codify law in the Second Circuit. Thus, it cannot be said that *Bradley*'s approach is in conformity with the law of that Circuit, or that the Second Circuit, vis-à-vis *Wallace*, is in conflict with *PAE*. Similarly, *Krauss* – an unreported decision of the Superior Court of Delaware – is not even a decision of that state's Supreme Court and, in any event, it addressed the application of a state rule of civil procedure, obviating any potential important federal question or conflict for this Court to review.

in the CAC. Petitioners cannot dispute this.

Unable to show a factual conflict between the complaints, Petitioners instead attempt to equate Respondent's decision to proceed (via the SAC) with only its negligence-based Securities Act claims and to drop its fraud-based Exchange Act claims, with the pleading of inconsistent facts. *See* Pet. at 13-14. Petitioners' argument fails, however, as plaintiffs may (1) allege different claims based on different theories of liability in the same complaint; (2) choose to proceed with certain allegations and not others as a litigation progresses; and (3) allege alternative theories of liability in support of a claim.

As an initial matter, the negligence-based Securities Act claims (and their factual basis) alleged in the SAC are virtually identical to those in the CAC. Indeed, Respondent expressly alleged negligence as the basis of its Securities Act claims in both the CAC and the SAC. *See* SER16, 85-86, 89-90 [¶¶38(c), 175-76, 190]; ER37-38, 67, 70, 73 [¶¶42, 123(c), 130-31, 145]. Accordingly, Petitioners' contention that Respondent "tactically" inserted allegations of negligence into the SAC for the first time is not true. *See* Pet. at 17-18.

In addition, the fact that Respondent alleged a different theory of liability in support of the CAC's Exchange Act claims, does not establish a conflict with the CAC's or the SAC's Securities Act claims. *See* Pet. at 19-24. Indeed, Petitioners' apples-to-oranges comparison of the negligence-based allegations in the SAC with the disposed-of, fraud-based Exchange Act claims in the CAC, at most, shows a conflict between two entirely distinct claims; not a factual conflict warranting the striking of allegations.

Petitioners' argument also conflicts with the express language of the *Federal Rules of Civil Procedure*, which permit a plaintiff to plead, in a single complaint, as many

different claims as it desires. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). Given that a plaintiff may choose which claims to assert in an initial pleading, there can be no doubt that a plaintiff may later decide to proceed under only one theory of liability. *See id.*; *see also* Fed. R. Civ. P. 8(d)(2). This is exactly what happened here. In the CAC, Respondent alleged claims under the Exchange Act, based on a theory of fraud, as well as claims under the Securities Act, based on a theory of negligence. In the SAC, however, Respondent decided to proceed only with its negligence-based claims. To do so is entirely within Respondent's right. *See Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002) (plaintiff is the "master of the complaint").

It is also implausible to suggest that the negligence-based allegations in the SAC would ever conflict with the fraud-based allegations supporting the Exchange Act claims in the CAC because negligence is a lesser-included mental state of fraud. *See Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1435 (9th Cir. 1984) (defining fraud-based scienter as a mental state greater than "ordinary negligence" but not quite "intent") (citations omitted); *Janas v. McCracken* (*In re Silicon Graphics, Inc. Sec. Litig.*), 183 F.3d 970, 976 (9th Cir. 1999) (scienter involves a mental state involving something more than "simple, or even inexcusable negligence..."), *reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999).

Acceptance of Petitioners' position, *i.e.*, that the fraud-based allegations of the CAC somehow poisoned the negligence-based allegations such that they cannot stand on their own in the SAC, would lead to an untenable result. Namely, plaintiffs would be forced plead Exchange Act and Securities Act claims in separate complaints to ensure that a dismissal of the former claims would not affect the viability

of the latter.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition and uphold the Ninth Circuit's ruling that the SAC, which contains only Securities Act claims rooted exclusively in theories of strict liability and negligence, is subject to the notice pleading standard of Rule 8(a).

Respectfully submitted,

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